BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities.	Rulemaking 00-02-004

COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON COMMISSIONER GRUENEICH'S ALTERNATE PROPOSED DECISION ON TELECOMMUNICATIONS CONSUMER PROTECTION PROGRAM

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I. INTRODUCTION

In accordance with Rule 77 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure and the schedule set forth in the Notice of Availability issued on January 25, 2006, the Division of Ratepayer Advocates (DRA) submits these comments on Commissioner Grueneich's Alternate Proposed Decision (Alternate) on the Telecommunications Consumer Protection Program. The Alternate adopts a comprehensive consumer protection program that includes four essential components - consumer rights, consumer protection rules, consumer education and enforcement program. The Alternate is correct in concluding that all of these four elements are necessary in order to make the consumer protection program truly meaningful for consumers. Commissioners Peevey and Kennedy's proposed decision (PD) also includes rights, education, and enforcement, but it eliminates virtually all of the consumer protection rules that were adopted by the Commission in May, 2004 and reflected in General Order (GO) 168. Consumer rights without corresponding consumer protection rules are not enforceable and are nothing more than a mere expression of legislative intent. Accordingly, DRA strongly supports the Alternate and recommends that the Commission adopt the Alternate and reject the PD. While DRA finds that the conclusions and findings reached in the Alternate are consistent with the law, in the public interest and based on the evidentiary record this proceeding, DRA also finds that a few modifications should be made to further clarify and strengthen the Alternate as discussed below.

II. DISCUSSION

A. The Applicability Section In Part 2 Of The Alternate Should Be Modified To Extend The Consumer Protection Rules To All Carriers And To All Services Regulated By The Commission.

The Alternate and the PD differ on who or what the consumer protection rules should apply to. The Alternate mirrors language adopted in Decision 04-05-057, (the May, 2004 Consumer Bill of Rights decision) and states that the rules should apply to all

telecommunications carriers, including wireless carriers, unless expressly exempted by the consumer protection rules or by Commission order.[1] The PD, on the other hand, shifts its focus away from the carriers and puts focuses on services instead and states that the rules should apply to all telecommunications services subject to the Commission's jurisdiction offered by telecommunications service providers.[2] While the consumer protection rules should indeed apply to all telecommunications carriers in order to establish a level playing field among all carrier types and to ensure that consumers are afforded the same protections under the consumer protection program regardless of the type of technology they choose, it is equally important that the rules also apply to all services that are regulated by this Commission. Although the current proposed language in the Alternate would cover all services regulated by this Commission by virtue of the fact the rules are made applicable to all telecommunications carriers regulated by the Commission, expressly adding the word "service" into the current Applicability section would further bolster and clarify the language and reach of the rules. This modification would be consistent with the Commission's rationale set forth in the May, 2004 decision which states that "We have reworded the definition of "carrier" to clarify that it includes all entities, whether required to be certificated or registered, that provide telecommunications–related products or services and are subject to the Commission's jurisdiction pursuant to the Public Utilities Code."[3] Accordingly, DRA recommends that the Applicability section be modified to expressly state that the rules apply to all telecommunications carriers and services regulated by and under this Commission's jurisdiction. By doing so, there would be no question as to who is subject to or what services are covered under the consumer protection rules.

[1] Alternate PD, p. A-2.

[2] PD, p. A-6.

[3] D.04-05-057, p. 23.

B. Language Regarding Law Enforcement Authority Should Be Applied To The Entire Decision.

DRA supports the Commission's intent to coordinate and cooperate with other law enforcement agencies, including the Attorney General's Office and the district attorneys, to enforce the consumer protection rules. Currently, the following paragraph is included in Parts 3 and 4 of the Alternate, but is missing from Part 2:

> Prosecution, whether civil or criminal, by any local or state law enforcement agency to enforce any consumer protection or privacy law does not interfere with any Commission policy, order or decision, or the performance of any duty of the Commission, related to the enactment or enforcement of these rules. Such prosecution, however, does not, in any way, limit the Commission's authority to interpret or enforce these rules as the Commission determines appropriate.

This paragraph should be included in Part 2 of the Alternate so that it is clear that the rules are not only enforceable by this Commission, but also by other law enforcement agencies.

C. Rule 9(a) Poses No Undue Burden On Carriers and Its Agents And Thus Should Not be Eliminated.

SBC at Commissioner Grueneich's February 1, 2006 All-Party Meeting (All-Party Meeting) voiced that Rule 9(a) created an implementation problem as it applied to its third-party vendors that it uses to sell products and services. Rule 9(a) requires carriers to issue an identification card to its employees as follows:

> Every carrier shall prepare and issue to every employee who, in the course of his or her employment, has occasion to enter the premises of subscribers of the carrier or applicants for service, an identification card in a distinctive format having a photograph of the employee. The carrier shall require every employee to present the card upon requesting entry into any building or structure on the premises of an applicant or subscriber.

Specifically, SBC asserts that when carriers use third-party vendors such as Best Buy or Circuit City to sell its products or services, it does not have the ability to require the

employees of those third-party vendors to have a photo ID.[4] SBC states that such a requirement rests with the vendors themselves and not with SBC.[5] SBC's argument is without merit.

Rule 9(a) only requires that carriers issue an ID to employees who would have the need to enter the premises of their subscribers or applicants of their service. Furthermore, the rule states that the presentation of the employee ID is only required when the employee actually enters the premises of an applicant or subscriber. Third-party vendors, such as Best Buy or Circuit City's primary duty is to sell SBC or other carriers' products and/or services. They do not engage in or provide any on-premises customer assistance; DRA is not aware of any third-party vendor that provides on-premises customer assistance as SBC alleges. Rather, any on-premises customer service, which typically includes repairing or installing of equipments, is done by the carriers themselves, or third-party entities that the carriers specifically engage for that purpose. Consequently, there would not normally be an occasion for a Best Buy or Circuit City employee to enter a customer's or applicant's premises on behalf of SBC or other carriers. Hence, there would be no need for SBC to issue employee IDs to third-party vendor employees.

However, if a carrier were to engage an entity to perform customer on-premises work, the carrier should still be required to issue a company ID card or badge to any person performing such work in order to ensure customer safety. The very intent of this rule is to protect consumers from unauthorized persons entering their homes or building and potentially harming them.[6] The photo ID requirement would make sure that persons entering a customer's premises are indeed actual and official representatives or employees of the carrier.

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[4] RT, February 1, 2006 Commissioner Grueneich All-Party Meeting, p. 11.

[5] Id.

[6] This rule affirmatively protects the consumer's right to safety, as expressed in the Alternate's Appendix A, Part 1.

This rule is also included in Commissioners Peevey and Kennedy's PD and the PD similarly concludes that "In general, we see both the practice of having official identification materials and the inclusion of this requirement in the General Orders as promoting public safety, a role for government that is independent of the marketplace."[7] The PD also concludes that "we [Commission] see little cost and much benefit to codifying this practice into the General Order."[8] DRA agrees with both the Alternate and the PD that there is no good reason to amend or delete this rule because the benefit of having it substantially outweighs any potential drawbacks. Accordingly, Rule 9(a) should not be removed.

D. Complaints

At the All-Party Meeting, Mike Day for CTIA noted that the huge majority of complaints against wireless carriers, about 74 percent, are in the category of "Billing." Claiming that Consumer Affairs Branch (CAB)'s complaint records show a very limited universe of complaints against wireless carriers to begin with, Mr. Day attempted to further limit that universe by discarding the billing complaint category, thereby relegating the complaint universe to only about 26 percent of the total complaints.[9] However, the Commission should not be swayed by the claim that billing complaints are no basis for implementing rules other than billing-related rules. As DRA's Lynn Maack stated in both prepared and oral testimonies, complaints in the "Billing" category contain more than concerns about computational billing errors. For example, they contain complaints about inadequate disclosures of calling plan details and prices.[10] Essentially, complaints in the billing category run the gamut of problems that people see with respect to their bills, such as the wrong amount or the wrong plan.[11] Rather than relegate the largest

[7] PD, p. 56.

[8] Id.

[9] RT, February 1, 2006 All-Party Meeting, pp. 43-44.

[10] Ex. 7, Maack, Prepared Testimony, p.12.

[11] RT, Vol. 14, p. 1383.

category of complaints only to rules covering billing practices, the Commission should focus on those complaints as indicative of a need for better disclosure rules.

Mr. Day also cited a Better Business Bureau's (BBB) settlement rate of 89 percent for wireless carrier complaints, asserting that the high rate of satisfied customers argues against consumer protection rules.[12] However, the high settlement rate gives no indication whether the underlying reasons for the complaints are being addressed and remedied. The Commission does not know whether it is the same abuses being repeated again and again and carriers absorbing as a cost of doing business the cost of compromise with the few customers who know how or make the effort to complain.

E. The Alternate Is Correct In Concluding That The Rules on Non-Communications-Related Charges Are Necessary and Not Burdensome.

The Alternate is correct in concluding that the need for the Non-Communications (non-com) related rules is justified because the record shows that significant harm resulting from cramming has occurred in California.[13] The Alternate is also correct in finding that the non-com rules do not impede technological development and are not burdensome to implement.[14] Specifically, DRA agrees with the Alternate that the rules are not burdensome because carriers are not limited to the use of the PIN code as the only security mechanism. The rules provide that carriers could use the PIN or "other equally reliable security procedure designed to prevent anyone other than the subscriber and individuals authorized by the subscriber from placing charges on the subscriber's account."[15] Thus, even if the PIN code is burdensome to implement (which it is not), the rules allow for other, equally secure mechanisms, and do not pose an undue burden on carriers.

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[12] RT, February 1, 2006 All-Party Meeting, pp. 41-42.

[13] Alternate, p. 41.

[14] Id. at p. 42.

[15] Alternate, p. 43.

DRA also agrees with the Alternate that the very heart of this issue is not the use of telephone handsets, but the potential for fraud, cramming and privacy violations such as identity theft through the non-authorized use of the consumer's telephone numbers.[16] Since the rules do not place any monetary limit on the non-com charges that can be placed on the phones, the potential for unauthorized use of someone's telephone number to charge goods and services in an unlimited, potentially exorbitant amount are very significant. Moreover, this is another rule wherein the benefit of having it clearly and substantially outweighs any potential cost, which appears to be very minimal.

While DRA strongly supports the non-com rules and strongly supports the inclusion of these rules into the consumer bill of rights, we note an error in the Alternate that should be corrected. The Alternate states that "No party has opined that PINs would or should be the only acceptable method, or that the ESN (electronic serial number) resident in every wireless instrument is not 'an equally reliable security procedure.' Carriers, in fact, argued that ESN is reliable."[17] Although PIN is a secure mechanism, ESN is not as secure or effective as a PIN and thus, would not qualify as an equally secure reliable mechanism that can or should be used by carriers in place of the PIN code. Unlike the PIN, the ESN only determines whose account the charge is billed to. As such, it does not prevent an unauthorized person from charging a product or service to someone else's telephone bill. Thus, as stated in our previously-filed pleadings, an electronic identifier is not as secure or effective as a PIN.[18]

Lastly, at the All- Party Meeting, Commissioner Grueneich asked Mr. Day of CTIA if there were any entity that currently offered non-com services in California. He answered that no wireless carrier currently offered such services.[19] The Wireline Group also stated none of the wireline carriers currently offered non-com services in

[16] Alternate PD, p. 44.

[17] Alternate PD, p. 43.

[18] Comments of the Division of Ratepayer Advocates on Commissioners Peevey and Kennedy's Proposed Decision on Telecommunications Consumer Bills of Rights, pp. 18 and 19.

California.[20] DRA, however, recently discovered that Sprint does currently offer non-com services in California. Sprint has a promotional offering for "Roadside Rescue," service which is a roadside assistance plan associated with the use of cell phones (*See Attachment A)*. According to the promotional offer, the service is $4 per month for the primary line and $2 per month for each shared line. The service would be billed each month on the wireless telephone bill and would include the typical roadside assistance tasks, like changing a flat tire, fuel delivery and towing. Regarding the promotional notice itself, a copy of which is attached hereto as Attachment A, DRA notes that the key terms and conditions are in very small fonts, making it very difficult to notice, let alone read or decipher.

F. Definition of "Small Business"

Time Warner, at the All-Party Meeting, voiced that the definition of "small business" is problematic because 20 access lines do not equal T-1.[21] It also asserted that a recent Commission decision, D.06-01-043, defined a very small business customer as a customer with four or less DS-0's, or four access lines.[22]

The Alternate provides the following definition for "small business" which is the same definition adopted in D.04-05-057:

> **Small Business:** a business that subscribes for not more than twenty telephone access lines from any single carrier, or an individual who subscribes directly for not more than twenty access lines from a single carrier for business use or combination business and personal use. A business or individual subscribing to more than one T-1 line may not be considered a small business customer. For purposes of these rules, all entities other than individual (e.g., government and

(continued from previous page)

[19] RT, February 1, 2006 Commissioner Grueneich All-Party Meeting, p. 38.

[20] Id. at p. 21.

[21] RT, February 1, 2006 All- Party Meeting, p. 71.

[22] Id.

> quasi-government agencies, associations, etc.) meeting the twenty-access and one T-1 line limits are treated the same.[23]

While it appears that there is no universal, agreed-upon, definition for "small business," the definition proposed in the Alternate is not problematic as suggested by Time Warner, but is, in fact, reasonable and justified. In the earlier phase of this proceeding, much discussion was held among the parties as to how the term "small business" should be defined. The proposals included California Small Business Roundtable/California Small Business Association's recommendation of 20 access lines to carriers' recommendations of 10 access lines initially and then later to three or fewer lines. In D.04-05-057, the Commission, after carefully considering all of the recommendations, decided on 20 access lines on the basis that "three lines is too low for that [consumer protection] purpose; in fact, we commonly see advertisements nowadays for 'family plans' offering more than three access lines in one account." [24]

Additionally, the Commission held T-1 should also be included in the definition of "small businesses," but that the definition would be limited to one T-1 service.[25] While Time Warner asserts that the definition is problematic because limiting it to 20 access lines, rather than, say, 15 or 24, is arbitrary and because 20 access lines also do not equal to one T-1, but that 24 access lines in fact does, the Commission was fully aware of this, but nonetheless decided to limit the definition to 20 lines on the basis that it reflected a reasonable compromise of all of the varied proposals. In footnote 16 of D.04-05-057, the Commission recognized that T-1 lines provide the capacity equivalent of 24 switched, voice-grade access lines."[26] Moreover, the Alternate proposed definition for "small business" is reasonable and justified and thus, is not problematic as suggested by Time Warner.

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[23] Alternate PD, p. A-14.

[24] D.04-05-057, pp. 25-26.

[25] D.04-05-057, p. 26.

[26] Id.

Time-Warner also asserted at the All-Party Meeting that the definition in the Alternate is inconsistent with the definition that the Commission adopted in D. 06-01-043.[27] To the contrary, there is no inconsistency. In the Alternate, a definition is proposed for "small business," whereas in D. 06-10-043, a definition is adopted for "*very* small businesses," as follows:

> SBC states that a very small business customer would have 23 or fewer DS-0s, while the CLECs assert a very small business customer would have less than four DS-0's. We concur with the CLECs, and adopt their definition in Section 0.1.5. A "very small business" is much more likely to have only a few business lines, and is not likely to be served by 23 DS-0s.[28]

Moreover, the proposed definition in the Alternate should be kept as is.

G. Rule 3(f) – 30–Day Rescission Period Does Not Prevent Carriers From Recouping Their Non-Recurring Costs.

SBC asserts that the 30-day rescission period provided in Rule 3(f) will prevent it from recovering its non-recurring costs if customers sign up for T-1, but later, within 30-days, cancel their service.[29] SBC has made this argument before and the Commission rejected it. Thus, it should be rejected again. Rule 3(f) proposed in the Alternate is as follows:

> Subscribers may cancel without termination fees or penalties any new tariffed service or any new contract for service within 30 days after the new service is initiated. This Rule does not relieve the subscriber from payment for per use and normal recurring charges applicable to the service incurred before canceling, or for the reasonable cost of work done on the customer's premises (such as wiring or equipment installation) before the subscriber canceled.[30]

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[27] RT, February 1, 2006 All-Party Meeting, p. 71.

[28] D.06-10-043, p.16.

[29] RT, February 1, 2006 All-Party Meeting, p. 9; Time Warner also made the same argument at the All-Party Meeting, See RT pp. 69-70.

[30] Alternate PD, p. A-4.

In D.04-10-013, a decision on the rehearing applications of AT&T Wireless, and Nextel of California, Inc., the Commission, in response to this very same argument propounded by the carriers, responded that,

> … the Rules do not prohibit any cost recovery. Wireline is free, under the Rules, to recoup the costs associated with [Rule] 3(f) … as part of its basic rates. All these Rules do is prohibit a carrier from charging one specific subscriber – the one identified in each Rule – for those costs.[31]

The Commission found no legal error with Rule 3(f) in this decision. Similarly, in the May, 2004 decision (D.04-05-057), the Commission also found that the rule does not prohibit carriers from recovering their non-recurring costs because "The rule . . . does not relieve the subscriber from obligations for use made of the service before canceling, or reasonable charges for work done on the customer's premises before the subscriber canceled.[32] Therefore, contrary to SBC's assertion, Commission decisions make it clear that the rule does not prevent carriers from recouping their non-recurring costs.

H. Rule 4 – Prepaid Calling Cards and Services

Mr. Glen Stover, representing two CLECs, argued at the All-Party Meeting that since the calling card regulations apply only to entities under PU Code §§885 and 886 (telecommunications carriers), there is created a market-affecting disparity between sellers of these cards that does not reflect the efficiencies of the providers.[33] As to Mr. Stover's argument, there is no burden placed on Commission-regulated entities that is not similarly placed on non-regulated entities. Rule 4 is taken directly and nearly verbatim from Business & Professions (B&P) Code § 17538.9, which applies to any and all providers of calling cards and services. The only difference in application between the regulated and non-regulated entities is that the Commission would be monitoring the

[31] D.04-10-013, p. 16.

[32] D.04-05-057, p. 49.

[33] RT, February 1, 2006 All-Party Meeting, p. 27.

regulated entities. The inclusion of Rule 4 furthers the Commission's goal of providing a common repository of consumer protection rules.

Mr. Stover further raised the argument that the California B&P Code has some of the same and similar laws as in Rule 4 regarding calling cards, and that if the legislature changes the statute, the Commission's rule will be potentially contradictory. The solution, as Commissioner Grueneich pointed out, is to modify the rules when, and if, the statutes change. Mr. Stover argues that there could be a lag between when a code change occurs and Rule 4 is changed. However, the Commission has a long history of changing its regulations when statutes change. This situation is no different. This Commission has and will continue to diligently monitor legislations and can stand ready to amend its regulations as conditions warrant. Thus, the argument against Rule 4 on this basis is without merit. Outweighing carrier concerns about the duplication of laws or the time lapse between code changes and rule changes is the importance of consumers having all telecom rules in one place, and the Commission's ability to enforce those rules.

Mr. John Gutierrez from Comcast also questioned why a company that sold a calling card with a non-English tagline should be expected to offer customer service in that other language. DRA posits that customers who receive cards advertised in a particular language or cards written in that language should have a reasonable expectation that they will receive service in that language. No one is forcing carriers and others to sell calling cards in other languages. If carriers choose to serve non-English-speaking consumers, those carriers should then be ready and able to provide adequate service, which includes being able to communicate with those consumers in a language they can understand.

III. CONCLUSION

For all of the foregoing reasons, DRA strongly supports the Alternate with the modifications proposed above. While both the Alternate and the PD include important consumer rights, consumer education and enforcement tools, the Alternate is superior to the PD because it also contains actual consumer protection rules that consumers can use

to protect and empower themselves and for law enforcement agencies to use to enforce the consumer rights.

Respectfully submitted,

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February 14, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON COMMISSIONER GRUENEICH'S ALTERNATE PROPOSED DECISION ON TELECOMMUNICATIONS CONSUMER PROTECTION PROGRAM** in **R.00-02-004** by using the following service:

[X] **E-Mail Service:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

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Executed on February 14, 2006 at San Francisco, California.

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Albert Hill

N O T I C E

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ATTACHMENT A